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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/771,382

01/25/2001

Ian Richard Anselm Peak

8795-24 U1

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02/27/2009

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EXAMINER

FORD, VANESSA L

ART UNIT

PAPER NUMBER

1645

MAIL DATE

DELIVERY MODE

02/27/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Advisory Action**  
**Before the Filing of an Appeal Brief**

Application No.

09/771,382

Applicant(s)

PEAK ET AL.

Examiner

VANESSA L. FORD

Art Unit

1645

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 22 January 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.

b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because

(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);

(b) ☐ They raise the issue of new matter (see NOTE below);

(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or

(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.

6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: 33,34,49-52,54,55 and 57-61.

Claim(s) objected to: NONE.

Claim(s) rejected: 62.

Claim(s) withdrawn from consideration: NONE.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.

12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_

13. ☐ Other: \_\_\_\_\_.

/Robert B Mondesi/

Supervisory Patent Examiner, Art Unit 1645

Continuation of 11. does NOT place the application in condition for allowance because: The rejection under 35 U.S.C. 102(a) is maintained newly submitted claim 62 for the reasons set forth on pages 2-6, paragraph 3 of the Final Office Action.

#### Applicant's Arguments

Applicant urges that the sequence alignment of SEQ ID NO:23 and SEQ ID NO:4 of Masignani et al only reveals 86% identity over the entire, wild-type sequences and alignment of SEQ ID Nos 35 and SEQ ID No:4 of Masignani et al only reveals a 77% identity over the entire, wild-type sequences. Applicant urges that Masignani et al do not disclose an isolated protein having at least 90% identity to SEQ ID Nos.23 and 35. Applicant urges that Masignani et al disclose a fragment or sub-region to an isolated protein which was not identified explicitly in Masignani et al.

#### Examiner's Response to Applicant's Arguments

Newly submitted claim 62 is directed to an isolated protein having at least 90% sequence identity to SEQ ID No:23 or SEQ ID NO. 35, wherein the isolated protein is a deletion mutant of a wild-type NhhA polypeptide and wherein the isolated protein is immunogenic. As stated in the Final Office action mailed 11/26/08, Masignani et al teach a N. meningitidis protein ORF40-1 protein (SEQ ID NO:4) that has the amino acid sequence that is 98.1% identity to SEQ ID NO:23. Masignani et al teach a N. meningitidis protein ORF40-1 protein (SEQ ID NO:4) that has the amino acid sequence that is 99.3% identity to SEQ ID NO:35. It should be noted that the claim is directed to proteins that have at least 90% sequence identity to SEQ ID Nos. 23 and 35 and not over the entire wild-type protein sequence.

In view of all of the above, this rejection is maintained.

The rejection under 35 U.S.C. 102(a) and 102(e) are maintained newly submitted claim 62 for the reasons set forth on pages 6-12, paragraphs 4 and 5 of the Final Office Action.

#### Applicant's Arguments

Applicant urges that an alignment of SEQ ID No. 23 and SEQ ID No.2 of Peak et al reveal 86% identity over the entire, wildtype sequences and an alignment of SEQ ID No.35 and SEQ ID No.2 of Peak et al reveal 86% identity over the entire, wildtype sequences. Applicant urges that Peak et al do not disclose an isolated protein having at least 90% identity to SEQ ID Nos.23 and 35. Applicant urges that Peak et al disclose a fragment or sub-region to an isolated protein which was not identified explicitly in Peak et al.

#### Examiner's Response to Applicant's Arguments

Newly submitted claim 62 is directed to an isolated protein having at least 90% sequence identity to SEQ ID No:23 or SEQ ID NO. 35, wherein the isolated protein is a deletion mutant of a wild-type NhhA polypeptide and wherein the isolated protein is immunogenic. As stated in the Final Office action mailed 11/26/08, Peak et al teach proteins from Neisseria meningitidis and pharmaceutical compositions containing the polypeptide (see the Abstract and pages 34-40). Peak et al teach a N. meningitidis protein (SEQ ID NO:21) that has the amino acid sequence that is 98.1% identity to SEQ ID NO:23. Peak et al teach a N. meningitidis protein (SEQ ID NO:21) that has the amino acid sequence that is 99.3% identity to SEQ ID NO:35. It should be noted that the claim is directed to proteins that have at least 90% sequence identity to SEQ ID Nos. 23 and 35 and not over the entire wild-type protein sequence.

In view of all of the above, this rejection is maintained.

Claims 33-34, 49-52, 54-55 and 57-61 are free of the cited art.